

No. 16282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L.
LEWIS, doing business as Studio Cosmetics Company,
Appellants,

vs.

SANDRA MAE NIHILL, a minor by her Father and Guard-
ian JOHN NIHILL,
Appellee.

BRIEF OF APPELLANT REXALL DRUG COMPANY, A CORPORATION.

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BRIEF OF APPELLANT REXALL DRUG COMPANY, A CORPORATION.

Statement of Jurisdiction.

The United States District Court for the Southern District of California, Central Division, had jurisdiction over the case because of the diversity of citizenship of the litigants and because the amount in controversy exceeded the sum of \$10,000 [R. 3, 4, 6].

U. S. C. A., Sec. 1332.

This Honorable Court has power to review the judgment entered upon the verdict of the jury in the District Court under its Appellate jurisdiction conferred by 28 U. S. C. A. 1291.

Statement of the Case.

On February 5, 1955, the mother of the plaintiff Sandra Mae Nihill bought a pin curl kit under the trade name of Cara Nome from the Kensal Drug Company, the only drugstore at Kensal, North Dakota.

The preparation in question was manufactured, packaged in kits, and labeled with the Rexall-owned trademark "Cara Nome", by the co-defendant Lewis under purchase orders issued from time to time by Rexall Drug Company. The name Rexall Drug Company did not appear anywhere on the packages. Rexall distributed these original packages without any changes or additions to various outlets. The Kensal Drug Company at Kensal, North Dakota, was one of these.

Sandra claims that shortly after the kit had been obtained at the drugstore, her mother, with the help of a neighbor, applied the lotion to Sandra's hair. It is claimed that within a week or two following this application, Sandra's hair began to come out as she would comb it. According to pictures introduced in evidence, the lack of hair, at one time, was nearly total. By the time of the trial, it had partially regrown.

Summary of Pleadings and Proceedings in Trial Court.

Following the above alleged occurrences and the loss of Sandra's hair the present action for damages was brought against the defendants. The amended complaint is in two counts. Plaintiff charged negligence in the manufacture of the preparation against both defendants in one count, and breach of warranty by both defendants in the other [R. 15, 16].

After plaintiff rested, motions were made by defendants independently for a judgment of nonsuit and at the

close of the case both made motions for directed verdict. These motions were also denied.

At the request of the plaintiff, the issues were narrowed and the case was submitted to the jury on the following questions only:

Against Lewis on the sole issue of negligent manufacture alone.

Against Rexall on the sole issue of breach of express warranty [R. 688-689, 690].

A verdict for plaintiff was returned in the sum of \$48,000 [R. 79], and judgment was entered thereon [R. 89]. Both defendants moved for a judgment notwithstanding the verdict or in the alternative for a new trial. These motions were denied by the court. Thereupon, both defendants appealed [R. 91-92].

Statement of Issues as to Rexall Drug Company.

The transcript references already alluded to [R. 688-690] have the express and unequivocal effect of limiting the issues to these questions as far as Rexall is concerned: (1) Whether Rexall made an express warranty, (2) whether plaintiff relied thereon, and (3) whether or not there was a breach thereof proximately causing damage to plaintiff.

Since this brief is filed on behalf of Rexall alone, and since it is concerned with the verdict and judgment only in so far as it pertains to the claim of breach of *express warranty*, we shall restrict ourselves to the facts and questions surrounding that issue.

However, the issue of breach of warranty entails all the subsidiary questions which were stated as the points re-

lied upon by Rexall on appeal [R. 809-810]. The basic questions for appeal are the following:

1. Did an express warrant, if made, extend to plaintiff?

2. Was an express warranty proved by competent evidence?

3. Is there evidence that the plaintiff or plaintiff's mother relied on the warranty, if one was actually made?

4. Did the use and application of the hair wave or pin curl solution actually produce the result complained of?

5. Did the trial court err prejudicially in the following rulings on the evidence:

(a) in admitting, over the objections of Rexall, Exhibits 8 through 25 and 28 [R. 190, 483, 495, 203-204];

(b) in not striking, as to the defendant Rexall, the depositions and testimony of Mrs. Carl Carlson [R. 532, 537, 755] and of Mrs. Donald Carlson [R. 448, 470, 526, 531, 755].

6. Did the trial court err in refusing to grant defendant Rexall's motion for a directed verdict [R. 701-702, 715], and the motion for judgment notwithstanding the verdict [R. 86-88, 91]?

Assignment of Errors.

1. The evidence herein is insufficient, as a matter of law, to support the judgment for the plaintiff and against the defendant Rexall Drug Co. for damages [R. 89].

2. The trial court erred in denying the motion of defendant Rexall Drug Co. for a directed verdict on the second count of the complaint [the express warranty count]. Said motion was made on these grounds: (1) that there was no privity of contract between the plaintiff

and Rexall Drug Co.; (2) that plaintiff failed to prove the making of an express warranty by Rexall Drug Co.; and (3) that there was no evidence of reliance upon the alleged guaranty or warranty of Rexall Drug Co. [R. 701-703, 715].

3. The court erred in admitting into evidence [R. 482] and thereafter refusing to strike from the evidence [R. 755] the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson which evidence was in substance that these two persons had purchased Cara Nome permanent wave lotion in March of 1955 at the same drugstore, applied it to their hair, and that it became straw-like and dry and the ends funny colored, that the hair broke off on combing, and that the ends split.

The objection was that no foundation was laid because it was not shown that the deponents either followed or failed to follow the directions [R. 480] and the motion to strike was on the ground that the depositions were immaterial because nothing in them tended to establish a breach of express warranty by Rexall to the plaintiff [R. 754-755].

4. The court erred in admitting into evidence Exhibits 8-25 [R. 495] all of which were ads not only of Rexall products but also of products not carrying the name of Rexall and not even made by Rexall. The ads stated generally that Rexall stands behind its *drug* products, and specifically with respect to Cara Nome that it would give natural curls, or silky softness and that it is faster and safer. We respectfully refer to the exhibits themselves because greater detail with respect to this assignment of error or setting out the ads in an appendix would unduly add to the length of this brief, and a fair impression of them can best be conveyed by a visual inspection of the exhibits.

Objection to their admission was on the ground that no foundation for their admission was laid, that there was no showing that plaintiff had ever seen the particular ads in question prior to the purchase of the Cara Nome solution, and that they do not contain express warranties [R. 483-484].

Summary of the Evidence.

With the questions just stated in mind, we now summarize the evidence.

(a) The Evidence Was Insufficient to Establish Either a Warranty or a Reliance Thereon.

Thomas Henry Stark, Assistant Manager of Insurance and Taxation at Rexall, in response to a subpoena, produced Rexall's advertising records [R. 151]. He was asked to segregate from the mass of materials the material which pertained to Cara Nome pin curl permanent [R. 153]. This was done later, and, as a consequence of the segregation, a number of advertising copy and mats were introduced into evidence marked Exhibits 8 through 25 [R. 483 and 495]. There was also introduced in evidence a pin curl kit and marked Exhibit 1 [R. 165]. That kit contained no guaranty [R. 164] and Lewis maintained that he did not put any guaranty in it. Rexall maintains that under the pre-trial order it was admitted that the product was bought in a sealed container from Lewis and dispensed in a sealed container, so that the claimed guaranty could not have been placed in it by Rexall [R. 165].

Sandra claims that Exhibit 7, which is purportedly a guaranty was "with the boxes of pin curls" right in the Kensal Drug Store [R. 201] and that she took one home with her [R. 203]. Thereupon Exhibit 7 was admitted in evidence [R. 203]. Sandra was also shown an exhibit num-

bered 28. She stated that it was contained in the pincurl kit which was purchased [R. 204].

Mrs. Nihill testified to the same effect, claiming that she saw Exhibit 7 at the Kensal Drug Store [R. 401], that she found it on the counter where the druggist had a pile of them with his display of Cara Nome pin curls, and that she picked it up and gave it to her attorney [R. 402]. She likewise stated that Exhibit 28 was in the Cara Nome kit which she purchased [R. 402].

As to Exhibit 7, there was, then, no evidence concerning its origin or who was responsible for its issuance. No one connected with defendant Rexall was questioned about the document marked Exhibit 7 but it was shown to defendant Lewis, who stated that he was not familiar with it, excepting that "I think I saw this at the Rexall Drug Company at one time" [R. 187]. No identification of Exhibit 28 was made by anyone connected with Rexall.

We take this earliest opportunity to emphasize that Exhibits 7 and 28 are nowhere connected with or traced to Rexall, so that if they could be said to be a warranty, it is nowhere shown that they are a warranty of the defendant Rexall. There is no evidence under what conditions the druggist in Kensal obtained copies of Exhibit 7. With respect to Exhibit 28, the printed matter found in the kit itself, the pre-trial order expressly excludes any assumption that it was placed therein by Rexall, or that Rexall had any responsibility for it, because pursuant to the pre-trial order [R. 28] Rexall received the packaged goods from the manufacturer and did not re-package them but shipped them in the original container to its distributors in the East.

Besides, an examination of these exhibits, as well as of the advertising [Exs. 8-25] which will appear later in

this brief will show, we are confident, that none of these exhibits contain a warranty.

The mother testified that she subscribed to the Farm Journal in her home and that she saw ads of Rexall including Cara Nome pin curls advertised in it. The ads usually said that the Rexall Drug Company stands behind all of its products, or "something like that." She claims she read these ads prior to February 5, 1955, and relied on them* [R. 440-441, 431]. She was the one who bought and paid for the product [R. 436].

This is literally all the evidence that can be found in the record with respect to the alleged warranty of Rexall. It clearly emerges from this summary that there was *no privity of contract* between Rexall and the mother of the plaintiff, to say nothing of the plaintiff herself. They had no direct contractual dealings with Rexall. The contract between the drugstore at Kensal and the Rexall distributor which was introduced in evidence makes it plain that the drugstore in Kensal was not the agent of Rexall for any purpose [R. 640-641, Def. Ex. B].

There was no competent evidence of *reliance*. It is not shown, that the specific advertising admitted as Exhibits 8 through 25 ever came to the attention of the plaintiff, or her mother, or that they read any of the texts represented by these various exhibits. It is the contention of Rexall that the exhibits in question (1) contain no warranty, (2) that they were not relied upon, and that for this reason they were erroneously admitted.

*There is no evidence that she claims to have relied on any ads not in the Farm Journal. In any event, she could not have relied on several of the ads [Exs. 16, 17, 18, 19] because they were published after February 5, 1955.

(b) The Evidence Was Insufficient to Show Causation.

The evidence with respect to causation, that is, evidence establishing that the application of the cold wave pin curl preparation actually produced the result of which plaintiff complains is likewise insufficient as a matter of law. It is, of course, true that the plaintiffs testified that a partial loss of hair following within a week or two after the application of the pin curl wave lotion, and it is true also that, according to the mother's testimony, the lotion was applied in accordance with the directions contained in the kit. But the mere temporal sequence of two events does not establish legally that the former is the cause of the latter. The evidence of causation was insufficient for at least two general reasons:

In the *first* place, *there was no evidence that the solution was in any way defective* or outside of the tolerances which are ordinarily present in solutions of this type. This matter, we are certain, will be taken up in detail in the brief of the co-defendant Lewis. We shall therefore refrain from elaborating on it at this point. However, we hereby adopt the arguments made by the co-defendant in that respect.

Secondly, none of the experts assigned the application of this particular solution as the cause of the loss of plaintiff's hair. The consensus of opinion of all the doctors was that the loss of hair resulted from an unknown cause.

Three doctors testified on behalf of plaintiff. The first, plaintiff's own town doctor, *Clarence S. Martin*, was a general practitioner. He noticed a slight or mild inflammation and prescribed salsum,* which is a prescription

*There is no consensus of opinion in the record as to the correct spelling.

for seborrheic dermatitis or, in lay terms, dandruff [R. 311]. He felt that plaintiff's condition *could* have been caused by a chemical solution containing ammonium thioglycolate, one of the ingredients in all hair wave solutions [R. 315]. He was not asked in what concentrations it would have to be present. Since the evidence is *without dispute* that ammonium thioglycolate in this particular chemical was within normal tolerances as found in all hair wave solutions, the solution, if the physical cause, could not under the law have been the *legal cause* of the loss of the hair.

It is important to note that neither of the two specialists whom plaintiff called made any statement to the effect that in their opinion plaintiff's loss of hair was caused to a reasonable medical certainty by the application of the cold wave solution.

The first of the specialists was *Dr. Melton*, who said that he did not assign a physical reason for the loss of hair in this case [R. 332]. He diagnosed the situation as alopecia, which means loss of hair from causes unknown. On the basis of pathological studies, this doctor stated that the specimens examined are "compatible with alopecia" [R. 328]. He defined alopecia as "loss of hair from causes unknown" [R. 333]. Over objection, this doctor was allowed to answer the question whether ammonium thioglycolate "in certain concentrations"* can or cannot be harmful to the skin or scalp. He answered that it can be harmful in the sense that *other allergic reactions* can occur in concentrations that are used [R. 336-337]. It appears from this doctor's testimony that he is unable or

*He was not told that the concentration in this particular solution was within customary limits. For this reason his answer cannot have any probative significance.

unwilling to make a diagnosis of the cause of the loss of plaintiff's hair. He states [R. 343] that he is unwilling to make a diagnosis that the plaintiff has or does not have alopecia.

He was asked about the drug selsum which Dr. Martin of Kensal used on the scalp or prescribed for the scalp of the plaintiff and stated that it would not ordinarily be used in case of a chemical injury of the hair or scalp [R. 344]. Other record references [R. 320, 347, 359] show that selsum, if improperly used, *could cause loss of hair*, that it should not be used when there is a burning of the scalp, and that there have been reports of a few cases where selsum caused loss of hair but that there are none authenticated. Selsum is used for the treatment of seborrheic dermatitis [R. 311] and that due to the mild inflammation of the scalp of the plaintiff when first examined by Dr. Martin, he did not feel that he should make a diagnosis of alopecia [R. 322]. He did, however, make a diagnosis of seborrheic dermatitis as already indicated [R. 369].

Neither Dr. Melton nor Dr. Martin made any tests with respect to allergies [R. 318, 344] and the expert Frank M. Melton did not ascertain a physical reason for the loss of hair [R. 332, 337, 343].

On the whole, the North Dakota doctors, both the general practitioner and the expert, did not come to any conclusion on which the jury could find that this particular solution caused the loss of hair. No examination or tests were made to determine whether or not the skin of plaintiff was sensitive to thioglycolate [R. 318].

There was some question as to whether a foreign chemical substance applied to the hair externally could progress down the hair shaft into the hair follicle under the

scalp [R. 338]. The foreign chemical was not specified but Dr. Melton answered “yes”. Other doctors stated that this was not possible [R. 330, 372] and still others that only certain oils would have that penetrative action and that the skin would ordinarily not absorb other liquids.

Dr. Harry Levitt, a Los Angeles dermatologist, was called as an expert. He expressed his opinion on the basis of an examination made at the time of the trial and upon the case history and depositions of the other doctors already referred to, including a Dr. Michelson, whose deposition was read on behalf of defendants.

Dr. Levitt came to the conclusion that the plaintiff had alopecia areata which, once more, is the loss of hair, usually very sudden, unattended by any changes of the scalp [R. 353].

Over objection, he was allowed to state whether or not to a reasonable medical certainty the loss of plaintiff’s hair could have been caused “*by a chemical*”* [R. 354] and he answered “yes”. A “chemical could be anything including water [R. 389]. This would not explain the same condition of alopecia areata in Sandra’s pubic area, which this expert also found [R. 353, 388]. There is no evidence that Cara Nome was applied to that area [R. 389].

Neither this doctor’s testimony nor that of the other experts already referred to is sufficiently definite and specific to tie the loss of plaintiff’s hair down to the use of the particular Cara Nome lotion, and we will argue in

*Emphasis ours. It is significant that, throughout the trial, plaintiff’s attorney studiously avoided mentioning the chemical composition of Cara Nome or the percentage of ammonium thioglycolate to his experts. That this testimony has no probative effect is established by such cases as: *Merrill v. Beaute Vues Corp.*, C. C. A. 10, (1956), 235 Fed. 893.

that connection that the objections of the defendants to the questions should have been sustained. It may be noted in this connection that the only known cause, according to Dr. Levitt, for alopecia is emotional tension and that otherwise the causes of this condition are unknown [R. 358]. He stated that according to the history which he received there was no evidence whatever of any chemical burns [R. 369].

If the causes of alopecia are unknown except for emotional tension, one wonders, of course, how the witness is in a position to state, as he attempts to do, to a reasonable medical certainty, that the loss of hair producing alopecia could be caused by "a chemical". One wonders still more when one notes [R. 390, 391] that he believes that emotional tension "will prove to be the only cause of alopecia areata".

He also ascertained from the history that Dr. Melton prescribed thyroid for the plaintiff [R. 373]. When there is a severe lack of thyroid function, he states, there must be a certain amount of loss of hair [R. 374, 380, 545]. But he does not think Sandra had that condition [R. 393].

The witness hinted that the loss of Sandra's hair was due to emotional shock. To him this is only known cause—besides other unknown causes—of alopecia areata.

That theory, however, suffers from the very serious defect that there was no evidence whatever of one of the hypothetical links. Neither the mother nor the doctor in Kensal testified to any emotional shock. The evidence, on the contrary, shows that Sandra was a *placid* and *undemonstrative* child [R. 365] and that she said the loss of the hair didn't bother her [R. 362].

Dr. Harvey E. Starr, specialist in dermatology, was called on behalf of the defendants and testified on the

basis of the testimony of Drs. Melton and Martin, already reviewed, and the deposition of Dr. Michelson and also on the basis of his own physical examination of Sandra [R. 553], that she is or was suffering from a case of *fragilitis crinium*. He gives as the underlying physiological cause a hypothyroid state [R. 554]. He was asked about the diminution in the size of the sebaceous glands which was revealed in a biopsy performed by Dr. Melton and states that in his opinion this diminution in size could not have been caused by the application of an external solution [R. 559-560]. Nor would the application of a normal solution damage the underlying tissue [R. 561]. Although his diagnosis is that of *fragilitis crinium*, he does not rule out the diagnosis of Dr. Michelson of *alopecia areata* [R. 582]. When he examined the plaintiff Sandra just before the trial, he found no bald areas. However, the thickness or the length of the hair differs in various spots [R. 586].

Dr. C. E. P. Jeffreys testified that he is a PhD with a degree from the Institute of Technology in Pasadena. He is a Doctor of Chemistry. He stated he is familiar with the ingredients of hair waving solutions and that a normal range for thioglycolate in such solutions is anywhere from 3 percent to as high as 10 percent [R. 590]. He made an analysis of Cara Nome pin wave solution from a batch No. 181 (which is the same batch from which the solution used by Sandra was taken) and found that it contained 6.94 thioglycolate acid [R. 591]. He also examined the PH factor of the same solution and found it to be 9.2 which is also within the accepted range for cold wave solutions [R. 592]. He also testified that there is very little absorption through the skin of any material from an aquatic or water solution and that the material most likely to be absorbed is in oil solutions [R. 595].

After it was established [R. 596-597] that the pin curl formula used at the time the making of batch No. 181 has never been changed he was also allowed to testify that he examined Cara Nome solution from batch No. 278 and that it contained 6.9 thioglycolate acid and that the PH factor was 9.02 [R. 599].

He stated that certain thioglycolate salts are used in tanning in certain strengths but that the ammonium thioglycolate salt which is contained in hair waving solution is *not used in tanning* [R. 603].

The final medical expert was *Dr. Henry E. Michelson* whose deposition was read. Both sides spoke in the highest terms of Dr. Michelson as being one of three or four world renowned specialists in dermatology. His examination, more than a year after the original application of the hair wave solution, did show a mild reddening of the entire scalp [R. 613]. According to Dr. Michelson, if hair is to be lost from the application or the reaction to an application of hair wave solution "there would have to be inflammation preceding the loss of hair" [R. 615]. The history given to him mentioned no such reddening [R. 613]. In his own experience he had never had a case where the hair was completely lost following the use of a permanent wave solution, and he was unable to come to any conclusion as to the cause of the loss of Sandra's hair [R. 614]. He read the report from Dr. Melton in which the following history was given:

"In February of 1955 patient had a home permanent. This was made by Cara Nome. It was for pin curls. Following the permanent there was no erythema—A. That is redness.

Q. "No vesiculas—A. That is blisters.

Q. "No signs of irritation" [R. 618].

can find no Nevada statute or case law covering the situation, it will look to the California law for the answer.

Since the Federal Court in diversity of citizenship cases will follow this conflict of laws rule established in California, the case here in question must be decided in accordance with California law as it interprets the Uniform Sales Act in force in both North Dakota and in California.

II.

Since the Product Here Involved Was Bought From a Retailer in North Dakota and Not From Rexall Directly, and Since Even the Purchaser Did Not Use It or Apply It to Her Own Person, There Is Not the Requisite Privity of Contract Between Rexall and Sandra Nihill Under Which Alone She Could Recover on the Strength of the Warranty.

We are assuming, but not conceding under this second point, that Rexall was, in fact, the manufacturer and not a middleman. We are also assuming, but not conceding, that the literature which was introduced in evidence does, in fact, constitute a warranty. In later points we shall show that neither of these assumptions are justified by the record.

It is beyond dispute in the record that the druggist in Kensal had no agency relationship to Rexall, that he was strictly a retailer, and that Rexall is strictly a wholesaler.

It is also beyond dispute that neither the plaintiff nor her mother ever entered into any contractual arrangement or relationship with Rexall. The question, therefore, is whether the claimed express warranties inure to the mother's benefit and through the mother to the benefit of the child.

There can be no doubt that *the requirement of privity is practically universal in the American jurisdictions*. Only a small minority of states dispense with it.

Text statements in support of this assertion and references to numerous authorities are collected in 77 C. J. S., Sales, Sec. 305, also in 46 Am. Jur., Sales, Sec. 810.

It is obvious from these text references, that most courts still insist that a warranty is a contractual obligation which does not run with personal property to the ultimate user. In the interest of brevity, we cite no cases. The texts mentioned cite numerous authorities. But we respectfully refer to the significant circumstance that a number of prominent writers have opposed the removal of the privity requirement, especially when ordinary manufactured products are concerned, allowing exceptions only in food cases or inherently dangerous products. See, for instance, Pound, *New Paths of Law* (1940) pp. 39-40, Williston on Sales, p. 244 (1948 ed.), Leidy, *Another New Tort*, 38 Mich. L. Rev. pp. 964, 986, Peairs, *the Cog in the Machine—a Study in Precedent*, 29 Boston Univ. L. Rev. 37, 76-78.

We would not attempt to conceal from this Honorable Court, even if we wanted to, that the views of other writers in the field are to the contrary and that there has been some agitation for abolishing the privity requirement. So far, however, the Supreme Court in California, as *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041, demonstrates, has not seen fit to follow in this suggested path.

(a) **California, Which Follows the Majority Rule in the United States, Does Not Permit an Ultimate Purchaser or Consumer to Sue the Distributor on an Express Warranty When There Is No Privity of Contract Between Them.**

As indicated, the overwhelming majority rule that privity is required for the purpose of enforcing an alleged express warranty was reaffirmed by the California Supreme Court in the recent case of *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041. The plaintiffs purchased from an intermediary a product of Sherwin-Williams Co. which was used to dust the plaintiff's cotton crop. The chemical had an adverse effect on the plants. Plaintiff brought an action alleging breach of warranty by Sherwin-Williams. We quote enough from the opinion to show both the contentions of the parties and the ruling of the court:

“The trial court instructed the jury in the language of subdivisions (1) and (2) of section 1735 of the Civil Code relating to the implied warranties of fitness of purpose and merchantable quality. The jurors were also told that, if there was an implied warranty under this section, there was no requirement of privity of contract between the manufacturer and the ultimate consumer, and the manufacturer would be liable, regardless of negligence, for the damage caused by any breach of this warranty. Sherwin Williams contends that the instructions are erroneous because, it asserts . . . (2) privity of contract is essential to liability for breach of warranty.

* * * * *

“. . . The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity be-

tween the original seller and a subsequent purchaser who is in no way a party to the original sale. (See *Lewis v. Terry*, 111 Cal. 39, 44 [43 P. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220]; *Cliff v. California Spray Chemical Co.*, 83 Cal. App. 424, 430 [257 P. 99]; 1 Williston on Sales [rev. ed. 1948] Sec. 244, pp. 645-648; 46 Am. Jur. 489-490; 17 A. L. R. 672, 709; 140 A. L. R. 192, 249-250.) In this state an exception to the requirement of privity has been made in cases involving foodstuffs, where it is held that an implied warranty of fitness for human consumption runs from the manufacturer to the ultimate consumer regardless of privity of contract. (*Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal. 2d 272 [93 P. 2d 799]; *Vaccarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 689 [163 P. 2d 470].) Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity. (See *Free v. Sluss*, 87 Cal. App. Supp. 933, 936-937 [197 P. 2d 854] [soap package contained printed guarantee of quality]; *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683 [288 N. W. 309, 312-313] [automobile manufacturer represented top of car to be made of seamless steel]; *Baxter v. Ford Motor Co.*, 168 Wash. 456 [12 P. 2d 409, 15 P. 2d 1118, 88 A. L. R. 521] [automobile manufacturer represented windshield to be nonshatterable glass]; *Simpson v. American Oil Co.*, 217 N. C. 542 [8 S. E. 2d 813, 815-816] [representation on label that insecticide was nonpoisonous to humans]; Prosser on Torts [1941] 688-693; 1 Williston on Sales [rev. ed. 1948]

648-650; Freezer, 'Manufacturer's Liability for Injuries Caused by His Product,' 37 Mich. L. Rev. 1; Jeanblanc, 'Manufacturer's Liability to Persons Other than Their Immediate Vendees,' 24 Va. L. Rev. 134, 146-155.) Neither exception is applicable here. The facts of the present case do not come within the exception relating to foodstuffs, and the other exception, where representations are made by means of labels or advertisements is applicable only to express warranties. As we have seen, the instruction involved here dealt only with implied warranties. Accordingly, it was error for the trial court to instruct that privity was not required" (pp. 692-696).

(b) **The Case at Bar Does Not Fall Within One of the Exceptions to the Privity Rule Set Out in the Case of Burr v. Sherwin-Williams Co.**

As we have seen, there is one well established exception to the requirement of privity in California, namely the sale of food stuffs. In fact, that exception to the privity rule is widespread in all States which strictly adhere to the requirement of privity in other cases. We need not dwell on this exception because, obviously, the case at bar does not fall into that classification.

Burr v. Sherwin-Williams Co., *supra*, contains the following dictum:

"Another *possible* exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity." (Emphasis ours.)

Plaintiff in the case at bar obviously sought to bring herself within this exception. In this connection it is important to notice that the Supreme Court made the statement of this exception by way of dictum and labeled it a "possible" exception. It is, therefore, clear that the question was not expressly decided in *Burr v. Sherwin-Williams*. If the situation were presented to the California Supreme Court on this precise point, it would be free to make its own independent decision at the time. The case which the Supreme Court cites in connection with this "possible" exception, namely, *Free v. Sluss*, 87 Cal. App. 2d Supp. 933, 936-937, 197 P. 2d 854, is a decision of the Appellate Department of the Superior Court in San Diego and is clearly distinguishable from the case at bar.

In that case Mr. James, one of the defendants, came to the plaintiff's retail grocery store and represented that he had a good product in a good looking package, namely, Frederick Margarita Soap. The retailer tried it himself in the home washing machine and found that it wasn't bad. Mr. James then came later and delivered a second batch of this soap which, contrary to the first batch, was found unfit for the purpose for which it was intended. The manufacturer had put on each box or package of soap a guaranty of quality which is set out in the opinion. When he was sued together with the wholesale dealer, he pleaded that there was want of privity. This plea was denied and the Appellate Department of the Superior Court decided without reference to any authorities that privity in the traditional sense was not required because the manufacturer had intentionally and deliberately led another, namely, *the retailer*, to believe that a condition existed which it knew was not the case. The evidence showed without contradiction that the manufacturer had marketed a

product without the necessary ingredients to produce merchantable soap.

Assuming, but not conceding, that warranties of an express nature were made and contained in the exhibits introduced at the time of the trial, the difference between the case at bar and the *Free v. Sluss* case can readily be seen.

(c) **The Case of Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612 (1958), Is Not the Law of the State of California.**

The only case in the State of California which we were able to find involving the application of a permanent cold wave is *Briggs v. National Industries, Inc.*, 92 Cal. App. 2d 542, 207 P. 2d 110. This case was not decided on the question of warranty. It terminated favorably to the defendant because the trial court granted a motion for judgment notwithstanding the verdict, and this judgment was affirmed on appeal. The case will be interesting in connection with the point of causal connection to be made later.

No case in California holds that in the case of a cosmetic product an alleged warranty made to the retailer extends through the retailer to the ultimate consumer.

The temptation to elaborate on the Toni Home Permanent case or to produce arguments pro and contrary as to whether or not the liability for defects in product should be extended by abolishing the rule of privity must be resisted in this connection because it is not germane to the issues before this court. The trial judge was bound to follow the California law, and the California law clearly does not warrant abolishing the privity requirement. On the contrary, in the light of so recent a decision as *Burr v. Sherwin-Williams Co.*, *supra*, the existence of privity

must be shown, and inasmuch as the trial court was not called upon and since it was not its function in this connection to pioneer for the State of California as to what is legal policy and what the law of the State of California should be, we respectfully submit that the California decisions indicating that the privity requirement is in full force in California should have been followed.

We turn now to the following questions (1) Was there, in fact, a warranty? (2) Was there sufficient evidence of reliance? (3) Was there sufficient evidence of causation?

III.

The Evidence Is Insufficient to Show That Rexall Made Any Express Warranties.

Assuming, but not conceding, that privity of contract with the ultimate consumer is not required, it is our next contention that the evidence was insufficient to show that any express warranties were actually made. We submit the following considerations:

(1) The question whether the writing or words claimed to be an express warranty in fact constitute one is a question of law for the court wherever the writing is undisputed or where the undisputed oral evidence definitely establishes the words used. This rule is stated in 46 Am. Jur., Sales, Sec. 321, as follows:

“If the facts or affirmations relied on to prove an express warranty rest wholly or partly in parol, it has been held that it is ordinarily the province of the jury to determine whether they amount to an express warranty. There is, however, much authority to the effect that the court must determine whether an affirmation contained in an agreement in writing

amounts to a warranty or not, and the same has been held true as regards an undisputed and unequivocal oral affirmation.”

The same rule is announced in *Hercules Powder Co. v. Rich* (C. C. A. 8th Cir.) 3 F. 2d 12, where the court stated on page 14 that it would be the duty of the court to declare that certain undisputed statements relied on were not warranties if this appeared as a matter of law. We submit that in the case at bar the words used in the exhibits are, as a matter of law, not susceptible to the construction that they constitute warranties. When the various exhibits introduced in evidence and of which it was said that they contained warranties are analyzed, we find the following picture:

(a) The original package was introduced in evidence and there was no warranty on the package whatsoever. *Not even the name of Rexall appeared on it.* The package merely bore the trade name “Cara Nome” and was asked for by plaintiff’s mother at the time of the purchase under its trade name.

(b) It was stipulated at the time of pre-trial that Rexall obtained the merchandise in the original package from the manufacturer. Therefore, anything that was claimed to be inside the package when it was delivered to Rexall for distribution would not be a warranty on the part of Rexall. This would eliminate exhibit 28 from consideration, even if its language could be considered to be in the nature of an express warranty.

(c) Exhibit 7 is claimed to constitute a guaranty and, in part, reads as follows:

“Double your money back if you do not agree
Cara Nome Natural Curl is the best home perman-

ment. . . . If you don't agree that Cara Nome Natural Curl is better than any other home permanent, simply mail the unused portion and container, together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Department F, 8480 Beverly Boulevard, Los Angeles 54, California, and they will give you twice the original purchase price in return."

The wording of this document being undisputed, it is a question of law whether it contains a warranty of quality. It is obvious, we submit, that it is in the nature of a "puffing of wares" which is a far cry from a warranty. It merely invites comparison with other similar products and claims that it is the best.

(d) Exhibits 8-25 are in the nature of advertising. It will be noted (i) that some of them bear a date subsequent to the purchase of the pin curl kit and therefore must be automatically eliminated from consideration; (ii) that none of them was shown to have actually been seen either by the mother or by Sandra, (iii) that none of them asserts or represents that Cara Nome is a Rexall drug product. For instance, Exhibit 8, typical of all the others, names a series of products in the nature of *drugs* which expressly bear the name "Rexall". In addition, but in a separate "box", the ad refers to such articles as Cara-Nome Pin Curl Lotion without designating it as a Rexall product. In these separate boxes in the various exhibits it is made clear that Rexall sells many products under labels other than its own, such as "Stag" products, products under the trade name of Ann Delafield, Lord Baltimore Pens, Klenzo Hair Brushes, Helen Cornell Nylon Hair Nets, Adrienne Powder Puffs, Cascade Pens and Pencils, Dura Flash Bulbs, etc. The promise of satisfaction is

extended only to *Rexall Drug products*, and even that language is in the nature of “puffing” and not in the nature of a representation of issuable fact. As to the pin curl lotion itself, nothing more is said than that its use assures natural looking curls or that it produces silky softness or that it produces more natural curls. None of these statements, we submit, go beyond “puffing”. We respectfully suggest that that should be declared, as a matter of law, not to constitute warranties.

(2) In California it is, of course, well settled that puffing of wares does not constitute a warranty, either express or implied.

See:

Williams v. Loenthal, 124 Cal. App. 179, 12 P. 2d 75;

Alexander v. Stone, 29 Cal. App. 488, 156 Pac. 998;

Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172.

There are numerous examples in the decided cases which show that expressions of opinion and sales talk do not constitute warranties. Thus, it is held continuously that a mere statement as to quality, even though extravagant, is in the nature of puffing and not a warranty. (*Michilene Tire Co. v. Schultz*, 145 Atl. 67, 295 Pa. St. 140.) Thus, a statement that a coat will wear very well or that a suit will wear like iron have been held to be puffing rather than warranties. See *Keenan v. Cherry*, 131 Atl. 309, 47 R. I. 125, and *Harberger v. Stern*, 189 N. Y. Supp. 74. A statement to a customer that she couldn't find a better vehicle and that it was perfect was not construed as a warranty in *Adams v. Peter Tramonitin Motor Sales, Inc.*, 42 N. J. Super. 313, 126 A. 2d 358.

IV.

The Evidence Shows That Neither the Plaintiff nor Her Mother Relied on the Alleged Warranties Which Were Made.

Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612, which dispensed with privity, was disposed of on the pleadings. It recognizes, however, the necessity of showing reliance.

Under this heading we shall endeavor to show that there was not sufficient evidence to establish that the plaintiff or her mother purchased the article in reliance on the advertising introduced into the record.

The requirement of reliance is universal. It is well established in California. See, for instance,

Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal. App. 2d 520, 125 P. 2d 113;

Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041;

Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P. 2d 873.

It matters not, therefore, how many representations or warranties are made. They are of no consequence if the buyer does not actually rely upon them.

We are, therefore, required to examine the record to see if there is any competent evidence of reliance.

The fact is that Sandra had merely heard of a Cara Nome lotion and that the mother had read in the Farm Journal some advertisement concerning that lotion. All she could remember about that advertisement is that it said in effect that Rexall stands behind its products [R. 401]. We have seen that her memory is not correct. The "guarantee" refers to its *drug* products.

She did testify that she read Rexall ads and that she relied on them, and that is the reason why she went into the Rexall drugstore to buy a Cara Nome kit [R. 401]. We invite the court's special attention to that page. It does not show anywhere that she was shown or identified the Exhibits 8-25 as the ones which she had seen. Plaintiff's own counsel states that she has never seen or read the exhibits in question. There is merely an assertion by co-counsel that what she read is identical with the exhibits [R. 494-495]. It is on the basis of this tenuous statement that the trial judge remarked,

“Well, I'll let them in. It's your case, Mr. Lanier. *If you get me in trouble here, why it's your poor little gal that's going to suffer from it*” (emphasis ours) [R. 495].

It cannot be said that the purchase was made on the basis of either Exhibit 28 which is claimed to have been in the box [R. 401]. The only testimony with respect to the guarantee [Ex. 7] is that she picked one up and took it home with her [R. 402] and with respect to Exhibit 28, that it was found in the Cara Nome kit [R. 402].

There is testimony that she took both the guarantee and Exhibit 28 and pinned them up on the wall in her home, but even if she read Exhibit 28, it was after the purchase and therefore not literature in reliance on which she purchased the merchandise. Therefore, not only was the literature in question not a warranty but, whatever its language, it was not the factor which induced the mother to purchase the article.

This leaves us with a consideration of her statement that she read an advertisement in the “Farm Journal”. *Significantly enough, as we saw, none of the 18 pieces of*

advertising which were introduced as Exhibits 8 to 25 were submitted to the plaintiff or to her mother and she was not asked with respect to a single one of them as to whether this was an ad upon which she allegedly relied. An examination of these ads will show that several of them appeared after February 5, 1955.

The law is that a newspaper ad which appeared after the purchase does not furnish a basis for recovery.

Degouveia v. H. D. Lee Mercantile Co. (Mo. App.), 100 S. W. 2d 336;

Evans v. Sears (Ga.), 176 S. E. 843.

Proof of reliance *on a Rexall product* is, therefore, completely lacking.

V.

The Evidence Was Insufficient to Show That the Product Purchased Had Any Defect in It or Was the Cause of Sandra's Loss of Hair.

As we pointed out earlier, Sandra and her mother claimed they applied the hair lotion in accordance with directions and that approximately a week or two afterwards, Sandra began to experience a *gradual* loss of hair. Actually the evidence is quite conflicting as to whether the directions were followed. There is not one iota of proof that this preparation contained a defect and that such defect caused the result of which Sandra complains.

(a) There Was No Evidence That the Cara Nome Solution Contained Any Deleterious Concentrations.

All the evidence shows is that the solution contained thioglycolate. But there is niether direct nor indirect evidence from which it may be inferred that thioglycolate is a deleterious and inherently dangerous substance. It may,

of course, not be palatable, it may have a strong odor, it may cause metal hair pins to rust,* and it may even cause internal damage when swallowed. But no representation was made that it could be taken internally and it was not, in fact, taken internally. There was not even an attempt to show that the application of a concentration of 6.93 percent thioglycolate or any other concentration upon the skin of any *ordinary human* will produce any results of an adverse nature whatsoever. It was further shown that the concentration of thioglycolate in the wave lotion was within standard and accepted tolerances. Plaintiff did not see fit to produce any expert or manufacturer, or any other evidence whatever to show that a 6.93 percent concentration is not within normal tolerances for human hair and for the human scalp.

Plaintiff was not in any way hampered in making a showing which would have established a harmful ingredient or a harmful concentration in this preparation, if such had been there in fact. Plaintiff introduced in evidence a kit of batch No. 181 which was unopened and not analyzed by plaintiff although obviously there was ample opportunity to do so, if it was believed that the chemical analysis of the defendants was in error. The manufacturer by his methods of control kept samples of the very batch in question for future analysis and such analysis was made at the request of the plaintiff. He also kept batch records and records of analyses of the very batch from which the solution in question was drawn. These also showed that the merchandise was within accepted tolerances. In short, plaintiff was as far from proving any-

*Many of us have had the experience of fishing rusted bobby pins out of a swimming pool, or seeing the rust form on an iron skillet, for simple illustrations.

thing harmful or deleterious or outside the range of normal hair wave solution tolerance as was the plaintiff in *Briggs v. National Industries, Inc.*, 92 Cal. App. 2d 542, 207 P. 2d 110.

In that case plaintiff's hair was treated with a Helen Curtis cream oil cold wave. Three days after this occurrence plaintiff had a severe dermatitis or inflammation of the skin, involving her face, neck, ears and shoulders with spots beginning on other parts of her body. It was admitted in that case that the cold wave solution used contained thioglycolate which has the effect of softening the hair so that it can be shaped. In that case there was even a physician testifying on behalf of the plaintiff, but he testified that the substance is an irritant only if it is used in concentrations of over 7 percent or 8 percent. The solution in that case was approximately 6.28 percent according to tests. Since this was in the normal range of tolerance, a suggestion or inference that there was a "partially allergic background" was almost inevitable, but whether there was an allergy or not, the court felt that inasmuch as a solution was used which did not exceed the limits of normal tolerance, a judgment in favor of the plaintiff could not have been sustained. The court said:

"It was not shown that the solution used on plaintiff was in fact dangerous or an irritant to the skin of any person any more than many cosmetics, face powders, cold cream and nail polish universally used by women. There is nothing in the testimony which indicates that many persons were susceptible to the product and might suffer damage through its use. In fact, from the record, plaintiff's complaint is the only instance in which injury from it was claimed."

It is true that in the case at bar there were approximately eight claimed injuries in a year out of all of the various types sold but there is no indication as to whether they were meritorious or not and they arose out of the sale of approximately 450,000 units.

(b) There Was No Evidence That the Cara Nome Preparation Caused the Loss of Sandra's Hair.

As to the second requirement, namely, that the substance used must have caused the injury, the record is equally barren of proof. Since the question with respect to Rexall is that of an express warranty and the consequences of its breach, no negligence is involved. In the case at bar there would have to be proof that the *natural* or *physical cause* of the injury is the solution itself. There is not sufficient evidence in this case from which the jury could have concluded that such was the case.

Certainly, neither the plaintiff nor her mother gave any testimony on the basis of which it could be established that the physical cause of the falling out of the hair or its destruction was the application of the lotion. There was no initial inflammation* and there was no irritation following the application of the solution. All that can be said from the testimony of Sandra and of her mother is that the loss of the hair began in temporal sequence with the approximate space of one week *or more* intervening between the application and the first signs of the loss of hair, but neither scientifically nor legally does it follow because two events occur in temporal sequence the event first in time is the physiological, biological or chemical cause of the later event.

*Although at the time of Dr. Martin's original examination he found a mild inflammation, this was 23 days after the alleged permanent and was perfectly consistent with the usual finding in sebarreic dematitis, which is unrelated to a cold wave reaction.

The testimony of the experts in this respect is equally inconclusive. Dr. Michelson, Dr. Jeffrey, and Dr. Starr stated that they deemed it extremely unlikely that the physical cause of plaintiff's loss of hair was the solution applied. The other doctors went as far as to say that while they did not know the cause of the loss of hair, it could be caused by an application of "a chemical". It is plain, therefore, that the record is entirely insufficient, as a matter of law, to show that the physical cause of the loss of hair was the wave solution that had been applied.

A very recent authority supports what has just been stated. In the first one, *Sheptur v. Proctor & Gamble Distributing Co.* (C. C. A. 6, 1958), 261 F. 2d 221, 223-4, the trial court directed a verdict for the defendant at the close of plaintiff's testimony, as we contend, should have been done in the case at bar [R. 755]. Plaintiff testified that her work required her to immerse her hands in dishwater for eight hours a day six days a week. A product known as Tide was furnished and used. At other times a product called Surf was employed. Plaintiff developed a severe skin irritation. She was treated and left her employment and was treated for several weeks. When she returned a different soap was used for several days, but then her employer reverted to Tide. She used Tide this time "just one day" and "quit right there." The doctor did not testify that Tide caused the irritation. Plaintiff said it was nothing else but Tide. Her expert medical witness who had never treated her, said that it "could have been caused by Tide if that was the product that was used in her dishwashing." The Circuit Court said:

"We think the judgment of the District Court must be affirmed. A doctor's testimony to the effect

that an alleged injury 'could have been caused' in the manner claimed has little probative value. *Cole v. Simpson*, 299 Mich. 589, 595, 1 N. W. 2d 2. Moreover, while lay witnesses such as plaintiff may testify as to what they observe and know, their testimony with reference to scientific facts requiring knowledge beyond that of the ordinary nonprofessional person has little evidential effect. *New York Life Insurance Company v. Newman*, 311 Mich. 368, 375, 18 N. W. 2d 859. One does not have to be an expert as to what one sees and knows in order to give probative testimony. *De Groot v. Winter*, 265 Mich. 274, 251 N. W. 425; *Austin v. Howard A. Davidson, Inc.*, 246 Mich. 599, 225 N. W. 524. Here, however, the question of the cause of the dermatitis involved scientific and medical facts beyond the knowledge or experience of plaintiff. *New York Life Insurance Company v. Newman*, supra. The instant case presented aspects upon which the testimony of an ordinary layman as to cause of the injury could shed little light. The fact that plaintiff was compelled to immerse her hands in heated water for eight hours a day six days a week was not to be ignored. Whether the water in which she had to immerse her hands so continuously was hard or soft, and whether it contained chemicals such as chlorine does not appear, although doubtless these facts would have had bearing. A complex scientific problem was presented as to whether the dermatitis might not have been caused by the particular water and its use for such a continuous time. The fact that plaintiff was supplied with Surf for a substantial period before quitting the restaurant also was important.

“It is to be observed that the court did not exclude this evidence. It was for the court to decide whether the evidence had sufficient probative force to present a jury question. The District Court rightly ruled, in view of plaintiff’s lack of training or experience, that her evidence was not sufficient to require submission of the case to the jury.

“The testimony of plaintiff’s expert witness also fails to develop a prima facie case. He did not say that Tide was a more probable cause of the dermatitis than Surf or the other soaps and detergents admitted to have been used by plaintiff, nor that Tide was a more probable cause than the use of the heated water under the circumstances.

“The rule upon this subject under Michigan law, which is controlling here, is thus stated in *Kaminski v. Grand Trunk Western Railroad Company*, 347 Mich. 417, at page 421, 79 N. W. 2d 899, at page 901:

“It is thus right to say that the trial judge’s immediate duty, motion for direction having been made with address to the rule of conjectural choice between equally plausible inferences, is to determine or favorable view of the inference plaintiff relies upon whether it stands equi-ponderant at best with such as is, or are, urged by the defendant. If the answer is affirmative, then and only then will the judge be justified in proceeding as moved.

“Some 30 years ago the supreme court of Alabama adopted a workable test-definition designed toward ascertainment of what is conjectural and what is not in negligence cases. That court recently referred to such definition as having “been quoted until it has be-

come a classic", *City of Bessemer v. Clowdus*, 261 Ala. 388, [394], 74 So. 2d 259, 263. We quote it as follows from the *Bessemer* case:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.”

“The scintilla rule does not obtain in Michigan. Under Michigan law, in order to make a *prima facie* case that requires submission to the jury, plaintiff's evidence must justify inferences that its contentions are at least equally as probable as those relied upon by defendant. *Kaminski v. Grand Trunk Western Railroad Company*, *supra*; *General Motors Corporation v. Wolverine Insurance Company*, 6 Cir., 255 F. 2d 8. The happening of an accident is not of itself any evidence of negligence. *Daigneau v. Young*, 349 Mich. 632, 85 N. W. 2d 88. Here there were two or three equally probable causes to account for plaintiff's condition. The probative evidence is not selective to any one of the possible causes. Cf. *Kaminski v. Grand Trunk Western Railroad Company supra*. The jury is not warranted in speculating under this record that Tide was the proximate cause of the in-

jury. *Frye v. City of Detroit*, 256 Mich. 466, 469, 239 N. W. 886. This case declares that the proof in such instances 'must show more than a possibility.'

"All questions presented have been considered. We find no reversible error in the ruling of the District Court."

(c) **The Alleged Result of the Application of the Lotion Was Not Foreseeable.**

The rule of foreseeability and remote consequences is ordinarily applied in connection with the question of negligence. Undoubtedly, it will be discussed at some length in the brief of co-defendant Lewis. But the rule also has its place in the law of warranties. In other words, *a warranty is not breached if the use of the product has unforeseen, unusual results that occur only rarely.*

In this case the evidence was that out of 450,000 kits an average of 8 complaints of various nature came to the attention of the claims manager of Rexall [R. 642]. In view of this figure the product cannot be inherently harmful, dangerous or defective. In so unusual a situation the reasoning of the court in *Merrill v. Beaute Vues Corporation* (C. C. A. 10, 1956) 235 F. 2d 893, is applicable. The plaintiff in that case used a hair waving product of defendant (containing thioglycoate) and suffered hives, nausea, and blurred vision. This was an unusual and generally unforeseeable result. As in the case at bar, no allergy on the part of the plaintiff was proved. The court, referring with approval to the case of *Briggs v. National Industries*, 92 Cal. App. 2d 542, 207 P. 2d 110, said:

"Although there was no direct evidence tending to show that the plaintiff was allergic to defendants' product or that her injury constituted an isolated injury to an unusually susceptible individual, the undis-

puted evidence is that with the exception of two cases referred to in the Robson-Cameron article, the injury to plaintiff's optic nerve is the only one reported out of five hundred million users of the product. This in itself is sufficient to sustain the court's finding on this subject. We are satisfied that considering all the facts and circumstances the issue was raised and the findings necessary. We therefore have the question as to whether a manufacturer who places a product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary or normal person, must respond in damages. Although there is authority to the contrary, we think the prevailing and better rule is that the injured persons in such cases cannot prevail. The reason generally given for the rule is that the injury is caused by allergy or the unusual susceptibility of the person and not the product. The essence of these decisions is that a reasonable person could not foresee the purchaser's condition and could not anticipate the harmful consequences. In the case at bar, as in similar cases, the plaintiff herself did not know that a usually harmless product could cause injury to her optic nerve. Until after the filing of the complaint, the defendants had no knowledge of like injuries to others, and then only two were reported. Under the circumstances, a warning would have been wholly ineffective. *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P. 2d 525, 26 A. L. R 2d 958, and *Briggs v. National Industries*, 92 Cal. App. 2d 542, 207 P. 2d 110, are cases dealing with cold wave products containing ammonium thioglycolate. In each case the plaintiff suf-

ferred reactions, other than optic neuritis, from coming into contact with the product, and in each case it was held that there was no liability on the part of the manufacturer. The Utah court, in referring to the cases relied upon by plaintiff, said:

“So far as they sanction recovery by an unanticipated few whose sensitivities or allergies are not reasonably foreseeable, we cannot accept them. Rather we must adhere to the philosophy enunciated by the cases reflected in respondent’s citations and which was put so aptly by Dean Prosser in his work on Torts, p. 679, to the effect that: “The manufacturer is at least entitled to assume that the chattel will be put to a normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use or some personal idiosyncrasy of the consumer.” Citing *Walstrom Optical Co. v. Miller*, Tex. Civ. App., 1933, 59 S. F. 2d 895.’

“Cases on the subject are collected in an annotation in 121 A. L. R. 464, and 26 A. L. R. 2d 963.

“Neither do we think that the defendants are liable to plaintiff on an implied or express warranty. Warranties do not extend to injuries caused by peculiar idiosyncrasies or physical condition of a user which are not reasonably foreseeable. The rule as to negligence in such cases applies to warranties. *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S. W. 2d 532; *Barrett v S. S. Kresge Co.*, 144 Pa. Super. 516, 19 A. 2d 502; *Stanton v. Sears Roebuck & Co.*, 312 Ill. App 496, 38 N. E. 2d 801; *Zager v. F. W Woolworth Co.*, 30 Cal. App 2d 324, 86 P. 2d 389; and cases collected in 26 A. L. R. 2d 966.”

VI.

The Trial Court Erred Prejudicially in Its Admission of Evidence (a) in Admitting the Deposition of Two Witnesses Claiming That They Had Had Adverse Results From the Application of Cara Nome, (b) in Admitting Into Evidence Exhibits 8 to 25 Containing Advertising Matter Without Foundation.

(a) It Was Error to Admit Into Evidence the Depositions of the Two Witnesses by the Name of Carlson.

Mrs. Donald Carlson testified [R. 526] that she purchased a Cara Nome permanent wave in March of 1955 in the same drugstore, that after application it made her hair strawlike and dry and the ends funny-colored, that it broke off on combing it, and that the ends were split. To her the lotion had no other smell than most permanents have [R. 529]. She testified that she felt a slight burning sensation on her hand but not any different from any other home wave solutions [R. 530]. The effect on her hair, however, whatever it might have been, was not permanent because she regained a full head of hair [R. 531]. The other *Mrs. Carlson* also referred to the strawlike and breaking of her hair after the permanent [R. 535]. She likewise had her hair cut and she likewise had a full growth of hair again.

We submit that the admission of this evidence was clearly erroneous. There is no evidence that the same batch was involved, there is no evidence that it was applied under the same conditions, there is no evidence that the results were similar or the same. Even if the requisite foundation had otherwise been laid, it would not be ad-

missible against Rexall in an action on a warranty because the only thing material in a warranty action would have been the result which the wave had when it was applied to the plaintiff.

(b) **The Trial Court Erred in Admitting Exhibits 8 to 25 Without Any Evidence Whatever That the Advertising Matter Was Seen or Relied Upon by the Plaintiff's Mother.**

At an earlier point we recited in detail the evidence with respect to the advertising matter admitted into evidence. The discussion in the record concerning its admissibility and the objection thereto appears on pages 494-495. The court itself stated that the *only* evidence that anybody read the ads in connection with this case was Mrs. Nihill reading the Farm Journal (p. 494). However, as we pointed out earlier, there is no evidence that she read any one of the ads offered. The attorney for the plaintiff was of a different opinion as to the state of the record, his recollection being that the mother had read the ads many times and particularly one magazine, namely, the Farm Journal. This assertion the record does not substantiate. Nevertheless, the court permitted the introduction of them with this comment: "It is your case, Mr. Lanier. If you get me in trouble here, why it's your little gal that is going to suffer from it" [R. 495].

VII.

The Trial Court Erred in Not Granting the Motion of Defendant Rexall for a Directed Verdict.

A directed verdict which defendant Rexall asked for [R. 475] should have been granted. From the cases cited in the earlier points it appears:

- (1) There was no evidence of an express warranty;
- (2) There was no evidence that plaintiff or her mother saw or relied on any alleged warranty;
- (3) There was no evidence that the pin curl solution was the cause of Sandra's loss of hair;
- (4) There was no privity between the defendant Rexall and the plaintiff or her mother.

We have shown that the record is insufficient as a matter of law on all four points to sustain the judgment. Lack of proof of any one of them, however, would have required the court to grant the motion for a directed verdict.

Conclusion.

In conclusion, we respectfully submit that the law in California extends the benefit of an express warranty only to those who stand in privity of contract to the seller. This rule is firmly settled as the policy of California and should not be upset by this Honorable Court on the strength of *Rogers v. Toni Home Permanent*.

If the requirement of privity of contract were dispensed with here, there would still be, it is submitted, insuperable hurdles in plaintiff's path, for

(a) she did not show that the pin curl solution was the proximate or physical cause of the loss of her hair;

(b) she did not show that the solution was dangerous, defective or improperly compounded;

(c) she did not show that any ads which came to her attention or to her mother's contained any warranty in fact or in law;

(d) she did not show that the kit was bought in reliance on any warranties of Rexall.

Finally, the trial court ruled erroneously, and to the prejudice of defendant Rexall in not striking the depositions of the Carlsons, and in admitting Exhibits 8 to 25 in evidence.

For all of these reasons, we respectfully urge that the judgment be reversed with directions to enter judgment for the defendant Rexall.

Respectfully submitted,

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Attorneys for Defendant Rexall.

APPENDIX "A."

List of Exhibits Offered and Received.

Exhibit Number	Page in record where identified	Page where offered and rejected	Page in record where offered and admitted
1	165		165
2	168		197
3	169		
4	172		173
5	174		
6	179	180	
7	186		203
8 to 25, incl.	190		495-496
26	192		196
27	192		
28	203		204
29	205		206
30	284		285
31	284		285
32	285		286
33	285		286
34	460		467
DEFENDANT'S EXHIBITS			
A	367		685
B	640		641
C, D, E, F	652		652
G	655		656

